

237297

ORIGINAL

BEFORE THE  
DEPARTMENT OF TRANSPORTATION  
WASHINGTON, D.C.

DEPT. OF TRANSPORTATION  
DOCKETS

2003 MAR 17 A 10:05

In the Matter of

Computer Reservation System  
(CRS) Regulations; Statements of General  
Policy

Notice of Proposed Rulemaking

Dockets OST-97-2881 - 365  
OST-97-3014 - 113  
OST-98-4775 - 162  
OST-99-5888 - 46

COMMENTS OF WORLDSPAN, L.P.

Communications with respect to this document should be sent to:

Douglas L. Abramson  
Senior Vice President, Human Resources  
General Counsel and Secretary  
WORLDSPAN, L.P.  
300 Galleria Parkway  
Atlanta, Georgia 30339  
(770) 563-7401

Charles J. Simpson, Jr.  
ZUCKERT, SCOUTT & RASENBERGER,  
L.L.P.  
888 17th Street, N.W.  
Suite 600  
Washington, D.C. 20006  
(202) 298-8660

Counsel for Worldspan, L.P.

March 17, 2003

## COMMENTS OF WORLDSPAN, L.P.

### TABLE OF CONTENTS

|   |           |
|---|-----------|
| <b>A. INTRODUCTION.....</b>   | <b>1</b>  |
| <b>B. STATEMENT OF WORLDSPAN’S POSITION.....</b>  | <b>3</b>  |
| 1. The CRS Rules Should Terminate Promptly.....   | 3         |
| 2. Alternatively, The Rules Should Be Suspended.....  | 7         |
| 3. As a Third Option, A Narrowed Part 255 Should Be Retained For A Transition<br>Period Only. ....                                    | 8         |
| <b>C. WORLDSPAN’S PERSPECTIVE.....</b>  | <b>9</b>  |
| <b>D. THERE IS NO BASIS FOR CONTINUING PART 255; THE CRS RULES<br/>    SHOULD TERMINATE PROMPTLY. ....</b>                            | <b>12</b> |
| 1. CRSs Do Not Hold Or Use “Market Power to Distort Airline Competition.” .....   | 12        |
| 2. Every Airline Is Not Compelled To Participate In Every CRS. ....   | 13        |
| 3. Airlines Hold Bargaining Power Vis-À-Vis CRSs; That Power Is Increasing<br>And Will Continue To Increase. ....                     | 17        |
| 4. The CRS Rules Have Constrained Airline Bargaining Power; Eliminating The<br>Rules May Increase It. ....                            | 19        |
| 5. Concerns About Booking Fees Are Unsupported; Developments Show That<br>CRSs Reduce Fees In Response To Competitive Pressures. .... | 20        |
| (a) Fees and Costs.....   | 21        |
| (b) Competitive Responses.....  | 22        |
| 6. CRSs Do Not Use Market Power To Impose Unreasonable Contract Terms On<br>Travel Agencies. ....                                     | 23        |
| <b>E. WORLDSPAN’S COMMENTS ON SPECIFIC PROPOSALS AND ISSUES.....</b>  | <b>25</b> |
| 1. Continued Need For The CRS Rules.....  | 25        |
| 2. Scope Of The CRS Rules.....  | 25        |
| (a) Applicability of Part 255.....  | 25        |

|   |           |
|---|-----------|
| (b) Extension of rules to Internet sites.....         | 26        |
| (c) “Short-term” subscriber contracts.....            | 26        |
| (d) Definition of “subscriber.”.....                  | 27        |
| 3. Booking Fees. ....                                 | 27        |
| 4. Mandatory Participation Rule.....                  | 28        |
| 5. Participating Carrier Agreement Provisions. ....   | 29        |
| 6. Display Bias.....                                  | 29        |
| 7. Subscriber Contracts And Productivity Pricing..... | 30        |
| (a) Contract term. ....                               | 31        |
| (b) Damages clauses.....                              | 31        |
| (c) Productivity pricing. ....                        | 32        |
| 8. Third-Party Hardware And Software.....             | 33        |
| 9. Marketing And Booking Data.....                    | 34        |
| 10. “Tying Of Internet Participation”. ....           | 35        |
| 11. The Department’s Statutory Authority .....        | 36        |
| 12. Sunset Date. ....                                 | 36        |
| 13. Effective Date of the Rules.....                  | 37        |
| <b>F. CONCLUSION. ....</b>                            | <b>38</b> |
| <b>LIST OF EXHIBITS. ....</b>                         | <b>39</b> |

**BEFORE THE  
DEPARTMENT OF TRANSPORTATION  
WASHINGTON, D.C.**

|   |   |                            |
|---|---|----------------------------|
| _____   | ) |                            |
| <b>In the Matter of</b>                         | ) |                            |
|   | ) |                            |
| <b>Computer Reservation System</b>              | ) | <b>Dockets OST-97-2881</b> |
| <b>(CRS) Regulations; Statements of General</b> | ) | <b>OST-97-3014</b>         |
| <b>Policy</b>                                   | ) | <b>OST-98-4775</b>         |
|   | ) | <b>OST-99-5888</b>         |
| <b>Notice of Proposed Rulemaking</b>            | ) |                            |
| _____   | ) |                            |

**Dated: March 17, 2003**

**COMMENTS OF WORLDSPAN, L.P.**

Worldspan, L.P. ("Worldspan") submits these comments on the Department's Notice of Proposed Rulemaking (NPRM) published on November 15, 2002.

**A. INTRODUCTION.**

If the Department were examining the CRS industry for the first time in 2003, it surely would not conclude that there exists either a compelling public interest justification or a legitimate basis for intervening in the market and imposing burdensome and restrictive regulations on CRSs. Simply stated, there is no existing basis in the record or in fact to support continued regulatory intervention. The ownership and control linkage between CRSs and major U.S. airlines, which was the factual and legal foundation for the promulgation of Part 255 in 1984, should soon be completely severed. Significant alternatives to the traditional travel agency-CRS model, which was also a focus of Part 255, are being developed and successfully launched with increasing frequency. For these and the other reasons discussed in these comments, it is neither necessary nor appropriate for the Department to continue to regulate the

CRS industry. Accordingly, Part 255 should terminate as promptly as possible and no later than the new sunset date that is established in Docket OST-2003-14484.<sup>1</sup>

Most commenters in this proceeding likely will argue that the existing rules are not doing what they were designed to do. Some, like Worldspan, will advocate the termination of the rules. Others will suggest that their specific concerns could be corrected by revising a particular section or sections of the rules, by adding or modifying definitions, or by adding entirely new rules. In theory, this might make sense: fix the rules to eliminate perceived problems and thereby put all constituencies back on a proper footing.

Finding the right regulatory “fix” or combination of “fixes” in the current market environment, however, has proven to be – and is – an unrealistic and unattainable goal. For one thing, there will be no agreement among the parties on what revisions are necessary, or for that matter, even what the goals of a revised Part 255 should be. Furthermore, the air transportation distribution market is so dynamic and the environment is changing so rapidly that any continued regulations, however amended, would be based on stale facts and be obsolete as soon as they are implemented. As a consequence, the process of proposing, debating and implementing and then complying with obsolete rules will entail an enormous waste of government and private sector resources, without a reasonable possibility of achieving intended regulatory objectives.

Rather than extending a futile effort to find the right regulatory “fix,” Worldspan urges the Department to take a different approach.

---

<sup>1</sup> In Docket OST-2003-14484, the Department proposed to extend the Part 255 sunset date from March 31, 2003 to January 31, 2004. In its comments, Worldspan stated its preference for no extension of the sunset date and alternatively proposed an extension until November 30, 2003.

**B. STATEMENT OF WORLDSPAN'S POSITION.**

**1. The CRS Rules Should Terminate Promptly.**

Worldspan's core position, which informs all of its comments, is that CRSs should be fully deregulated and that Part 255 should terminate as promptly as possible. Subject to the general applicability of the antitrust laws and consumer protection laws and, to the extent applicable, the Department's enforcement powers under Section 41712, market forces should be allowed to identify and correct harmful practices in the CRS industry, just as they do in most other industries. Deregulation of the CRS industry and reliance on market forces would be consistent with the goal of the Airline Deregulation Act to place "maximum reliance on competitive market forces and on actual and potential competition"<sup>2</sup> and with Congress' admonition in 1978 that "the time has come for a major change and fundamental redirection as to the manner of regulation ...so as to place primary emphasis on competition."<sup>3</sup>

Full and prompt CRS deregulation is warranted because the competitive concerns that underlay the promulgation of Part 255 in 1984 simply no longer apply in 2003 and beyond. The NPRM contains no current evidence – and there is none – that competition in air transportation is being or will be harmed by CRS-related practices or that it would be harmed in the future by the absence of the existing or proposed rules. Indeed, every recent development in the airline travel distribution market weighs against continued regulation of CRSs.

Part 255 was a regulatory response to the conduct of specific airlines that were aggressively using CRSs owned and controlled solely by them to distort airline competition and

---

<sup>2</sup> Pub. L. No. 95-504, § 3, 92 Stat. 1706 (1978).

<sup>3</sup> S. Rep. No. 95-631, at 52 (1978).

improve their relative performance in the industry. There was no separate rationale for regulating CRSs independent of their ownership and control by airlines, and the CAB did not attempt to extend the regulations to “non-airline CRSs.” The CAB summarized Part 255 and its underlying rationale as follows:

“The CAB is adopting rules that deal with competitive abuses and consumer injury resulting from practices of those airlines that provide computer reservations services to other air carriers and travel agents.”

“CRS owners have a substantial degree of power over price and output in the CRS industry. Moreover, because they are competitors in the downstream air transportation industry, they have the ability and incentive to exercise that power in ways that may interfere with air transport competition.”<sup>4</sup>

This underlying airline-CRS link, however, has been cut in the U.S. Airline ownership/control of CRSs has declined significantly since the CRS rules were enacted and is no longer a legitimate cause for regulatory concern:

- Sabre and Galileo, the two largest CRSs in the U.S. (as measured by bookings made by traditional brick-and-mortar travel agencies in the U.S.), which together with their then-airline owners were at the heart of the CAB’s concerns in 1984, have had no airline ownership for several years.
- Worldspan, which is the third largest U.S. CRS in terms of traditional travel agency bookings and the second largest in bookings when online marketers are included, is scheduled to be sold to non-airline investors in the near future.<sup>5</sup> Following the

---

<sup>4</sup> 49 Fed. Reg. 32540 (Aug. 15, 1984) (emphasis added).

<sup>5</sup> Worldspan is a limited partnership owned by affiliates of Delta Air Lines, Northwest Airlines and American Airlines. The three carriers have entered into an agreement agreed to sell 100 percent of their ownership interests in Worldspan to Citicorp Venture Capital Equity Partners and Teachers’ Merchant Bank. The purchase transaction is expected to close in mid-2003, (continued...)

conclusion of this transaction, there will be no U.S. airline ownership of any CRS.

- Unlike Sabre and Apollo in 1984, Worldspan has never been owned and used as a competitive weapon by a single airline; Worldspan's three current airline owners are competitors of one another and do not use Worldspan to compete with other airlines.
- Amadeus, the smallest CRS in the United States, is a publicly traded company that is owned by three non-U.S. airlines that are competitors of one another.

As a consequence, in 2003 airlines do not use CRSs owned, controlled or marketed by them as competitive (or anti-competitive) weapons against each other (or anyone else) in air transportation markets in the U.S.

The concern about airlines using CRSs as competitive weapons is further undercut by actual airline behavior. No airline is building on the traditional CRS-travel agency channel in an effort to expand the supposed competitive advantages of CRS affiliation in air transportation markets. To the contrary, airlines are adopting ways to reduce reliance on this channel. Whether by promoting the use of airline-branded consumer websites, building agency-direct websites, constructing branded corporate booking tools or establishing direct links with entities such as Orbitz, Navitaire and others, airlines are embracing alternatives to the traditional agency-CRS channel. In these efforts, airlines that own or market a CRS are behaving in the same way as airlines that do not. This would not be the case if CRS ownership or other affiliation produced significant competitive advantages for airlines in air transportation markets.

---

(...continued)

subject to the satisfaction of normal closing conditions. See Press Release, Worldspan, LP, "Worldspan to be Acquired by Private Equity Firms," (Mar. 4, 2003).



Although the preamble to the NPRM contains various tentative assertions that CRSs maintain and exercise “market power” over airlines and “distort airline competition,” these assertions are necessarily vague and unsupported. Indeed, it is clear that any “market power” that any of the CRSs might once have held is shrinking or gone, that the Internet and on-line travel agencies such as Expedia, Priceline, Hotwire, and Orbitz are providing significant competitive alternatives or supplements to CRSs, and that CRSs are not distorting airline competition in any manner.

Furthermore, the air transportation distribution market is highly dynamic, and the pace of change is accelerating. New travel distribution business models and technologies are being developed and implemented all the time and are dramatically altering the business relations between CRSs and airlines, between websites and airlines, between websites and CRSs and between travel agencies and CRSs. The Department’s rules, as existing and proposed, cannot fully or accurately account for these changes. It is neither reasonable nor justifiable for the Department to maintain or implement regulations based on facts that existed at a given point of time in the past, when the evidence and experience clearly indicate that the facts are rapidly and dramatically changing. Because of this constant change and the inability of the Department accurately to forecast the future, regulations will immediately become obsolete or even worse, cause harm. The public interest will best be served by promptly terminating the CRS rules.<sup>6</sup>

---

<sup>6</sup> Worldspan is certainly not the only advocate of CRS deregulation. Some of the very airlines that the NPRM suggests may need continued regulatory protection under Part 255 also have taken the position that Part 255 should terminate. See, e.g., Comments of American Airlines, Comments of Northwest Airlines, Comments of United Air Lines, Docket OST-2003-14484 (Feb. 28, 2003); Comments of Northwest Airlines, Comments of United Air Lines, Docket OST-2002-11577 (Mar. 18, 2002); Comments of Northwest Airlines, Comments of (continued...)

Finally, full deregulation will put all CRSs on an equal regulatory footing, as they should be. Any potential regulatory distinctions between CRSs – which distinctions would be unsupportable in the current and foreseeable environments, in any event – would properly be eliminated by deregulation. Similarly, full deregulation will put CRSs on equal footing with other distribution channels, such as Internet sites, that currently are not regulated.

**2. Alternatively, The Rules Should Be Suspended.**

Alternatively, Worldspan submits, as it did in comments filed in March 2002, that the Department should implement a two year suspension of the CRS rules, during which market forces would be allowed to govern free of governmental restrictions and the marketplace could reveal those practices, if any, that require (and are within the statutory reach of) regulation under Title 49. Following this suspension period, the Department and the industry could gather current and relevant information and data and the Department would be in a much better position than it is today to propose rules that address any actual, current anti-competitive practices in the marketplace. This approach, while perhaps novel, would be significantly preferable to the position in which the Department finds itself today, i.e., proposing regulations that necessarily are based on stale or missing facts and on speculation about (a) the nature of the air transportation and distribution industries in the future and (b) the impact of proposed regulations on those industries and consumers.

---

(...continued)

American Airlines, Comments of United Air Lines, Dockets OST-1997-2881 et al., (Sept. 22, 2000).

**3. As a Third Option, A Narrowed Part 255 Should Be Retained For A Transition Period Only.**

Short of terminating or suspending the CRS rules as suggested above, as a third option Worldspan urges the Department to implement a clearly and strictly scheduled transition to full deregulation. As many provisions of Part 255 as possible should be eliminated and/or narrowed immediately. Any provisions of Part 255 that are retained beyond the current sunset date should not be expanded, should be effective during a brief transition period only, and should terminate on a clear and final sunset date. In its recent notice proposing to extend the Part 255 sunset date until January 31, 2004, the Department recognized the possibility that any Part 255 rules that are retained following this proceeding would be effective on a “temporary,” “short term” basis only.<sup>7</sup> Worldspan suggests a transition period of not more than twelve (12) months beyond the new sunset date that is established in Docket OST-2003-14484.

Furthermore, if Part 255 is retained, whether for a temporary transition period or otherwise, it should be amended in accordance with the Department’s proposals to narrow Part 255.<sup>8</sup> Subject to its position that Part 255 should terminate on the current sunset date, Worldspan supports certain proposals, in particular: the elimination of the fee non-discrimination rule and the mandatory participation rule. On the other hand, Worldspan strongly opposes the Department’s proposals to expand any provisions of Part 255 or add new ones. Finally, Worldspan knows of no existing rational or factually-supportable basis for applying Part 255 to some CRSs and not others and submits that any retained provisions of Part 255 must apply to all equally.

---

<sup>7</sup> Notice of Proposed Rulemaking, 68 Fed. Reg. 7325, 7326 (Feb. 13, 2003).

<sup>8</sup> Worldspan’s positions on specific proposals to amend Part 255 are set forth in Part E below.

**C. WORLDSPAN'S PERSPECTIVE.**

Worldspan was formed in 1990 as a competitive alternative to the large incumbent CRSs, Sabre and Apollo (as the Galileo system was then known). Worldspan saw first-hand the efforts of those two systems and their then-airline owners to restrict competition among CRSs as a means of impacting competition among airlines. Consequently, Worldspan generally supported continued and enhanced CRS regulation when the Department issued its last major NPRM in 1991. The market has changed dramatically since that time, however, and Worldspan recognizes, as the current NPRM does in part, that competition would be enhanced by the termination of the rules.

Worldspan views the issues confronting airline distribution from a unique and balanced perspective. Worldspan is at once:

- the only U.S. CRS that did not exist when the CRS rules were promulgated in 1984;
- the third largest out of the four CRSs in terms of bookings by traditional travel agents in the U.S. (behind Sabre and Galileo);<sup>9</sup>
- the smallest CRS in terms of worldwide bookings;
- the largest CRS in terms of bookings by on-line travel agencies;<sup>10</sup> and
- the only CRS currently owned by U.S. airlines.

As only the third largest “traditional” CRS in the U.S. and the smallest on a worldwide basis, Worldspan recognizes that it must grow to remain competitive from a cost standpoint. In

---

<sup>9</sup> Market shares: 2002 U.S. Bookings by Traditional Travel Agencies:

Sabre 45.9%, Galileo 25.9%, Worldspan 18.4%, Amadeus 9.9%

See Exhibit WSP-1.

<sup>10</sup> See Exhibit WSP-1.

an unregulated market, Worldspan would have a free and fair and more realistic opportunity to expand its markets and market share through imagination, hard work and technological, service, price and product innovation. The CRS rules, such as the fee non-discrimination rule, stifle innovation and restrict opportunities for growth. Thus, Worldspan strongly favors the repeal of those regulatory restrictions.

Worldspan's status as the largest processor of on-line bookings is a testament to Worldspan's innovation and dedication to supporting competitive, cost-effective alternatives to the traditional travel agency-CRS-airline distribution model that has prevailed since the early 1980's.<sup>11</sup> In 1998, less than three percent of the U.S. and Canada bookings processed by Worldspan were from on-line/e-commerce sources; in 2002, approximately 49 percent of those bookings processed by Worldspan were from on-line/e-commerce sources.<sup>12</sup> Worldspan will soon become the first CRS to receive a majority of its U.S. bookings from on-line agencies.

Similarly, in 1998 Worldspan processed approximately 28 percent of all U.S. bookings processed by CRSs from on-line agencies; in 2002, that figure grew to approximately 65 percent. At the same time, Worldspan's share of U.S. bookings from traditional travel agencies remained constant at approximately 19 percent.<sup>13</sup> As these data indicate, Worldspan has directly experienced the growing ability of on-line agencies to provide bona fide, effective competition to the traditional CRS model.

---

<sup>11</sup> Worldspan processes bookings from Expedia, Orbitz and Priceline, among other on-line agencies. Worldspan does not have an ownership interest in an on-line agency, in contrast, for example, to Sabre's 100 percent ownership of Travelocity.

<sup>12</sup> See Exhibit WSP-2.

<sup>13</sup> These data do not include bookings from proprietary airline websites. See Exhibits WSP-1 and WSP-2.

As the only CRS currently owned by U.S. airlines, Worldspan is uniquely qualified to comment on whether airlines use CRSs as competitive weapons against other airlines in U.S. markets. The complete answer is that they do not. Although the CAB was concerned in 1984 that American Airlines and United Air Lines were using the Sabre and Apollo systems, respectively, to harm airline competition, any such concerns are wholly unfounded and irrelevant today. The three airlines that own Worldspan are fierce competitors of one another and have different marketplace strengths, strategies and objectives. They most certainly do not have – and could not arrive at – a unified approach for using Worldspan as a weapon against other airlines. In short, Worldspan’s current ownership creates no basis for competitive concerns requiring regulatory action. In any event, as explained above, Worldspan’s airline owners have entered into an agreement to sell their ownership interests to non-airline investors in a transaction that is scheduled to close in mid-2003.

From its unique perspective, Worldspan has concluded that “the current travel distribution business model, which has served the industry for many years, is broken.”<sup>14</sup> Worldspan recognizes that travel suppliers (e.g., airlines) believe not only that they receive insufficient value for booking fees that they pay, but also that distribution costs are not equitably shared. With this problem in mind, last summer Worldspan announced that it had begun developing a new business model to better reflect the value of its services and spread the costs of distribution more equitably.<sup>15</sup> Worldspan continues to work on developing this breakthrough

---

<sup>14</sup> Statement of Paul J. Blackney, President and CEO, Worldspan, L.P., before the National Commission to Ensure Consumer Information and Choice in the Airline Industry, at 1 (June 26, 2002).

<sup>15</sup> Press Release, Worldspan, LP, “Worldspan to Evaluate New Pricing Strategies”(June 3, 2002).

restructuring of the CRS pricing model. Worldspan firmly believes, however, that under existing regulatory restrictions – in particular, restrictions on booking fee flexibility and subscriber contract provisions – Worldspan’s ability to implement a new pricing model in a way that maximizes the potential benefits of the model to suppliers, travel agents and consumers will be unnecessarily constrained.

**D. THERE IS NO BASIS FOR CONTINUING PART 255; THE CRS RULES SHOULD TERMINATE PROMPTLY.**

**1. CRSs Do Not Hold Or Use “Market Power to Distort Airline Competition.”**

The threshold and overriding issue raised in the NPRM is whether “CRS practices still require regulation and, if so, which regulations are necessary, in light of the substantial changes in airline distribution and system ownership since our last reexamination of the rules.”

(69368).<sup>16</sup> In response, the NPRM tentatively concludes that “it seems necessary to maintain at least some of the rules” beyond the scheduled sunset date. (Id.)

This tentative conclusion is based almost entirely on the belief that CRSs may hold and exercise “market power” and may use that power to “distort airline competition.” In this regard, the NRPM asks whether “the systems still have the power to distort airline competition” (69375) (emphasis added) and tentatively asserts that they do. The following statements are representative:

“The systems’ market power has been reflected in their fees and other terms for airline participation.” (69420)

“If the systems continue to have market power, there might be a significant risk that systems would use their market power to distort airline competition....” (69382)

---

<sup>16</sup> Page references are to the Federal Register, November 15, 2002.

“Without the rules, we tentatively believe that the systems would have the power and incentive to distort airline competition....” (69420).<sup>17</sup>

Although there may have been grounds to support such a position in 1984 and in 1992, these assertions are unfounded in the existing and foreseeable market environments. In 1984, the record established that the two largest U.S. airlines were using their CRSs to disadvantage their airline competitors. Unlike 1984, however, the record in this proceeding contains no current evidence – and the NPRM does not specifically assert – that CRSs are being used to the competitive advantage of some airlines and the competitive disadvantage of others. Indeed, the NPRM contains no evidence or empirical data to support the conclusion that CRSs currently use “market power” to “distort airline competition.” Furthermore, there is no clear explanation in the NPRM as to how the rules actually would address the perceived issue of CRS market power, in any event.

**2. Every Airline Is Not Compelled To Participate In Every CRS.**

At the core of the Department’s tentative view that CRSs exercise market power over airlines (and thereby allegedly distort airline competition) is the Department’s idea that airlines must participate in every CRS and, consequently, have no power to negotiate terms and conditions of participation. According to the NPRM, “Most airlines have had to participate in every system” and “airlines (with a few exceptions) generally have not been able to afford not to participate in each of the systems...As a result, airlines have not had significant bargaining leverage against the systems.” (69419, 69380).

This statement reflects a former reality. The increasing use of airline websites and other on-line channels that do not use a travel agency or CRS for booking purposes is steadily reducing

---

<sup>17</sup> The terms “CRS and “system” are used herein interchangeably.



airline reliance on CRSs. The NPRM correctly states: “We recognize, however, that ongoing developments in the airline distribution and CRS businesses are making participation in each system less necessary than before.” (69376). These important developments include:

- Orbitz’s “Supplier Link” direct connect technology – which enables consumers and participating airlines to bypass CRSs. Since August 2002, ten U.S. carriers representing a substantial segment of the U.S. market, including American, Continental, Delta and United, have agreed to implement Supplier Link.<sup>18</sup>
- Navitaire, which offers direct distribution technology bypassing CRSs. Navitaire lists six major U.S. airlines as customers.<sup>19</sup>
- Aqua, which will allow brick and mortar travel agencies to bypass CRSs and connect directly with on-line agencies such as Orbitz.
- Several airlines, including current Worldspan owners Delta and Northwest, support dedicated travel agency websites that help the agencies to bypass CRSs.
- Travel agencies also use the airlines’ public websites to shop for and book the lowest available fares for their clients.
- Available third-party tools such as “Fare Chase,” “Side-Step” and others facilitate fare shopping by travel agencies outside of the CRS channel.

These developments and others will continue to reduce the traditional role and significance of CRSs in the distribution of air transportation.

---

<sup>18</sup> Worldspan understands that as of March 1, 2003, American, Continental and Northwest have implemented Supplier Link.

<sup>19</sup> These customers are American, Delta, Continental, Northwest, United and US Airways. See [www.Navitaire.com](http://www.Navitaire.com)

Furthermore, the Department's view that airlines are compelled to participate in every CRS is based on the proposition that travel agencies will continue to have the "predominant role in airline distribution." (69378). Actual developments undermine this view. Since 1997, when the Department issued its ANPRM in this proceeding, there has been over a nine (9) percent annual reduction in the number of U.S. bookings processed by traditional brick and mortar travel agencies using a CRS. For the same period, the analogous number of domestic revenue passenger enplanements for the industry declined by less than one (1) percent annually.<sup>20</sup> This difference in rates of change indicates a marked, declining dependency by airlines on the traditional travel agency/CRS channel.

In addition, the success of airlines such as Southwest Airlines and JetBlue belies the proposition that airline participation in every – or even a single – CRS is a competitive necessity.<sup>21</sup> Although the Department has treated the experience of carriers such as Southwest as somewhat incidental to the analysis of whether CRSs are being used to harm competition in the air transportation industry (for example, the NPRM minimizes Southwest's importance because of its "unusual business plan" (69379)), the growth of carriers such as Southwest means that an ever-increasing segment of the air transportation industry does not participate in every CRS.

In 1992, when the Department last substantially revised and re-issued its CRS rules, Southwest had a domestic market share of 6.1 percent (measured in enplanements). Its steady growth is shown as follows:

---

<sup>20</sup> See Exhibit WSP-3.

<sup>21</sup> Approximately 80 percent of Southwest bookings and 90 Percent of JetBlue bookings are made directly with the carriers. Travel Weekly, Feb. 3. 2003, at 57.

| <u>Year</u> | <u>SW Market Share <sup>22</sup></u> |
|-------------|--------------------------------------|
| 1992        | 6.1%                                 |
| 1997        | 9.2%                                 |
| 2002        | 12.0%                                |

Similarly, the total U.S. market share of airlines that participate in CRSs on a limited basis is steadily growing:

| <u>Year</u> | <u>Market Share <sup>23</sup></u> |
|-------------|-----------------------------------|
| 1997        | 9.2%                              |
| 1998        | 10.5%                             |
| 1999        | 11.2%                             |
| 2000        | 12.2%                             |
| 2001        | 13.8%                             |
| 2002        | 14.9%                             |

This growth is also demonstrated by the fact that, while overall U.S. industry enplanements declined by 4.5 percent from 1997 through 2002, enplanements by airlines that participate in CRSs on a limited basis increased by 47 percent. Thus, the carriers that are pursuing what the Department characterizes as an “unusual business plan” continue to grow in terms of total passengers carried and they deliver dramatically different (and better) financial results than the traditional carrier community. Indeed, it is readily apparent that the Southwest business plan has become a model that even the largest carriers may need to adopt. The business plan for Song, Delta’s new low-fare subsidiary, is predicated on a significant volume of bookings being made through Song’s proprietary website (flysong.com). Song expects 70 percent of its

---

<sup>22</sup> See Exhibit WSP-4.

<sup>23</sup> See Exhibit WSP-5.

bookings to be made directly with the airline.<sup>24</sup> In short, the segments of the air transportation market that bypass CRSs, whether through the airlines' own proprietary websites, through technologies such as Supplier Link and Navitaire, or through other vehicles, will continue to grow and will do so at an increasing rate.<sup>25</sup>

**3. Airlines Hold Bargaining Power Vis-À-Vis CRSs; That Power Is Increasing And Will Continue To Increase.**

Although the argument could be made that CRSs – and the largest CRSs in particular – hold a degree of bargaining power in their dealings with airlines, this does not establish that CRSs have market power, much less that they are using market power to cause competitive harm in the air transportation industry.<sup>26</sup> In fact, CRSs (or Worldspan, in any event) do not have an

---

<sup>24</sup> Travel Weekly, Feb. 3, 2003, at 1.

<sup>25</sup> The NPRM states, “[a]irlines have little ability to encourage most consumers to shift their bookings from travel agents to their own websites.” (69378). Worldspan respectfully disagrees. If (as is common) a consumer receives a \$20 on-line discount by booking on an airline’s website and avoids a \$20 service fee that a travel agent would charge, the consumer realizes a 10 percent saving on a \$400 ticket. This is a significant difference which should lead consumers to use the on-line channel. By way of reference, in analyzing product substitutability for market definition purposes, the Justice Department generally considers a “small but significant and non-transitory” price increase to be 5 percent. Department of Justice and FTC Horizontal Merger Guidelines, Section 1.11.

<sup>26</sup> The possession of power and the use of power to cause competitive harm are distinct. It is black letter law that possession of “monopoly power” is not in itself illegal and that a firm violates Section 2 of the Sherman Act only if it holds monopoly power and maintains or attempts to maintain a monopoly, such as by exclusionary conduct. See, e.g., U.S. v. Microsoft Corp., 253 F.3d 53-54 (D.C. Cir. 2001). The basic difference between “market power” and “monopoly power” is that “monopoly power is commonly thought of as ‘substantial’ market power.” *Reazin v. Blue Cross and Blue Shield of Kansas, Inc.*, 899 F.2d 951, 967 (10<sup>th</sup> Cir. 1990). Even if a CRS possesses “market power,” therefore, the mere possession of that power in itself cannot be deemed to be anti-competitive. There must also be evidence that the CRS is affirmatively using that power to harm airline competition. Worldspan is not engaged in any such conduct and the NPRM offers no evidence that Worldspan is engaged in any such conduct.

unconstrained ability to impose supra-competitive terms on airlines on a take-it-or-leave-it basis, as the NPRM's suppositions about "market power" imply.

In Worldspan's experience, airlines have an opportunity and ability to negotiate terms of CRS participation (although this admittedly has been constrained by the fee non-discrimination rule).<sup>27</sup> The airline/CRS relationship is one of mutual interdependence for the obvious reason that airline participation is critical to CRSs. Without broad and strong participation, a CRS's product is adversely impacted and its value to current and future subscribers is reduced. As correctly stated by the Department, "a system's inability to offer complete information and full functionality on an airline frequently booked by travel agents in one region could undermine the system's ability to obtain subscribers in that area." (69382-83). In the highly competitive markets for subscribers, this is not a commercial risk that Worldspan or other CRSs can afford to take lightly. Thus, contrary to the Department's supposition, a negotiating balance does exist between CRSs and airlines.

The Department previously has recognized that CRSs do not hold unconstrained power to impose unreasonable terms on airlines. In connection with the promulgation of the mandatory participation rule in 1992, the Department stated, "we expect that the refusal of many carriers to use a particular enhancement should conclusively demonstrate that the terms for participation are not reasonable because the price and the expenses are too high." 57 Fed.Reg. 43800 (Sept. 22, 1992). Moreover, in the current NPRM, the Department acknowledges that CRS dependence on airlines is increasing while airline dependence on CRSs is decreasing:

---

<sup>27</sup> The elimination of the fee discrimination rule would increase the airline's bargaining power by increasing the ability of a CRS to accommodate the airline's demands, as discussed below.

“Many airlines, however, have become less dependent on the systems, and the systems have become more dependent on the airlines’ willingness to provide complete access to their fares...” (69381) (emphasis added).

The dependence of CRSs on participating airlines is directly contrary to – and substantially undermines – the proposition that CRSs exercise unconstrained “market power” to impose unreasonable terms on airlines and distort airline competition.

In addition, if CRSs actually wielded “market power” over airlines, as the NPRM suggests, the CRSs presumably would not have undertaken steps such the 10 percent fee reduction and three-year fee freeze reportedly contained in Sabre’s “Direct Connect Availability” offering<sup>28</sup> or the 20 percent fee reduction and three-year fee freeze reportedly contained in Galileo’s “Momentum” program.<sup>29</sup> Nor would CRSs have condoned airlines implementing programs such as American’s “EveryFare,” which allows agencies to access airlines’ webfares in exchange for a shift in the responsibility for the associated booking fees.<sup>30</sup>

**4. The CRS Rules Have Constrained Airline Bargaining Power;  
Eliminating The Rules May Increase It.**

The NPRM correctly acknowledges that the Department’s own rules have helped to upset the negotiating balance between CRSs and airlines. The Department has correctly proposed to address this perverse situation by deregulating. The Department’s proposal to eliminate the

---

<sup>28</sup> Press Release, Sabre Holdings Corp., “Sabre Holdings Announces New Airline Participation Level; Long Term Commitment To Premium GDS Level” (Oct. 21, 2002).

<sup>29</sup> Press Release, Galileo International, “Leaders in Travel Business Gain Momentum in Aggressive Move to Revitalize Industry and Reduce Distribution Costs; Galileo, Rosenbluth International, United Airlines and U.S. Airways Launch Unparalleled Program” (Jan. 21, 2003).

<sup>30</sup> Press Release, American Airlines, “TQ3 Maritz Travel Solutions Now Offers American Airlines Web Fares Through American’s New EveryFare Program: First Global Agency With American Webfare Access Through GDS” (Nov. 14, 2002).

booking fee non-discrimination rule (a proposal that Worldspan supports), if implemented, might expand the airlines' ability and power to negotiate new pricing and service arrangements.

The NPRM recognizes that the non-discrimination rule "may limit the ability of individual airlines to negotiate for better terms" and that "a system might be more likely to give...an airline lower fees if it were not required by our rules to do the same for all participating airlines." (69399, 69381). To the extent that a CRS currently refuses to negotiate booking fee levels with an airline on the grounds that the CRS rules prohibit the CRS from giving the airline a "better deal" (i.e., a discriminatory deal), that prohibition would disappear under the Department's proposal.

Likewise, the Department's proposal to eliminate the mandatory participation rule (also a proposal that Worldspan supports), if implemented, might also expand the ability of the airlines that are affected by the rule to negotiate new pricing arrangements. The Department correctly recognizes that "the rule may unduly limit the ability of individual airlines to bargain for better terms with the systems." (69394).

**5. Concerns About Booking Fees Are Unsupported; Developments Show That CRSs Reduce Fees In Response To Competitive Pressures.**

The NPRM's statements about CRS "market power" are ultimately based on a concern that CRSs may be charging airlines booking fees that may exceed costs "by a significant amount." (69382). The Department, however, has not quantified this concern or supported it with any empirical data. Likewise, the record in this proceeding contains no evidence to support the assertion that Worldspan's booking fees (or those of any other CRSs) are unrelated to cost or "supra-competitive."

**(a) Fees and Costs.**

With respect to booking fees levels, during the period 1998-2002 Worldspan's average realized booking fee for U.S. bookings increased by approximately 3.2 percent per year. As this figure includes the fee impact of service level upgrades and enhanced functionalities selected by participating airlines, which account for an average annual fee increase of approximately one percent, Worldspan's actual apples-to-apples annual fee increase was only 2.2 percent (approximately) over the indicated period. This is roughly comparable with the CPI over the same period.

On the cost side, many of Worldspan's costs have increased substantially in recent years. The amount of computer processing, mainframe system capacity and network usage required by airlines has risen dramatically. This is partially the result of growing fare complexities, increasing functionality such as E-ticketing, and support for airlines' revenue management systems. The steady shift to on-line bookings and on-line shopping has greatly increased technology and processing costs. Over the past ten years, for example, the number of messages that Worldspan processes per actual booking has increased by a multiple of four.

This increase in the technology needed to support increasingly complicated fare shopping and other new distribution features has resulted in the growth of technology costs per booking, despite a reduction in the costs per unit of computer capacity. For example, from 1996 to 2002, Worldspan experienced an average annual decline of between 20 and 25 percent in its cost per Millions of Instructions per Second ("MIP," a measure of mainframe capacity). On the other hand, Worldspan also experienced an average annual increase of between 40 and 45 percent in the number of MIPS required to complete a booking. The welcome decline in unit computer



capacity costs has been much more than offset by the increasing consumption of computer capacity per booking.

Worldspan is always taking steps to control the growth in costs and to minimize Worldspan's operating costs. Recent efforts include entering into innovative commercial arrangements with key technology suppliers,<sup>31</sup> developing innovative, cost-reducing functionality<sup>32</sup> and down-sizing Worldspan's workforce.<sup>33</sup>

**(b) Competitive Responses.**

Recent developments demonstrate that CRSs are taking steps to reduce their charges to airlines (and, as demonstrated by American's EveryFare program, the airlines themselves are implementing arrangements to reduce their booking fee expenses). In June 2002 Worldspan announced that it was developing a new pricing model that may fundamentally change how Worldspan charges for its services. This initiative could significantly reduce the booking fees paid by airlines and other suppliers. In addition, in October 2002 Sabre announced its Direct Connect Availability plan that is reportedly designed to reduce airline booking fees by

---

<sup>31</sup> See Press Release, Worldspan, LP, "Worldspan, IBM Strengthen Relationship with New Strategic technology Agreement" (Jan. 14, 2003).

<sup>32</sup> See Press Release, Worldspan, LP, "Worldspan Launches ePricing, the Next Generation In Fare Search Technology" (Jan. 29, 2002). This application is designed (among other goals) to make the fare search function more cost effective. See also press release, Worldspan, LP, "Worldspan Unveils Airline Source e-certified, Industry First Solution for Reducing Message Volume and Costs in Online Channel" (July 11, 2002). This application is designed to reduce supplier costs in supporting availability inquiries associated with fare shopping in the online channel, while maintaining the integrity of supplier revenue management systems. Worldspan has applied for a patent to cover this innovative solution.

<sup>33</sup> Since March 2001, Worldspan has reduced its staff by over 500 persons (roughly 16 percent) through a combination of programs.

approximately ten percent. In January 2003, Galileo announced its Momentum plan that will reportedly reduce participants' booking fees by approximately 20 percent.<sup>34</sup>

These initiatives are marketplace responses to the development of competitive alternatives to the CRSs. Firms that hold unconstrained market power, however, should be invulnerable to such competitive pressures. The actions in the CRS industry are not characteristic of firms that hold unconstrained "market power" for the very reason that, in 2003, CRSs do not hold such power.

Furthermore, these developments are proof that the marketplace is working. Just as in an unregulated air transportation marketplace, in which airlines are forced to restructure and adjust their business models in response to competitive pressures and innovations by carriers such as Southwest, Air Tran and JetBlue (and are able to do so without economic-based regulatory restrictions), an unregulated CRS marketplace will produce greater competitive pressures on CRSs while affording CRSs greater flexibility to implement pro-competitive, pro-consumer responses.<sup>35</sup>

**6. CRSs Do Not Use Market Power To Impose Unreasonable Contract Terms On Travel Agencies.**

It is in the area of subscriber contracts that the NPRM proposes the greatest expansion of government intervention in the marketplace. The NPRM suggests that CRSs use their alleged market power to impose contract terms on travel agency subscribers in order to deter subscribers from using alternatives to CRSs and, thereby, "reinforce the systems' existing market power

---

<sup>34</sup> See footnotes 28 and 29, supra.

<sup>35</sup> As stated above, many of the airlines that (the NPRM suggests) require regulatory protection from CRS "market power" support deregulation and the termination of Part 255.

against the airlines.” (69423). The NPRM specifically targets the length of contract terms, “damage clauses” in contracts, “productivity pricing” arrangements and contract provisions addressing the use of third-party hardware and software.

There are at least two major fallacies in the NPRM analysis. First, as discussed above, the ever-increasing development of technologies allowing airlines, travel agencies and consumers to bypass CRSs is evidence that the use of alternatives to CRSs is not being deterred and will not be deterred in the future.

Second, it is abundantly clear that CRSs are not in a position to impose undesirable terms on travel agency subscribers. The NPRM correctly acknowledges that CRSs “compete vigorously for travel agency subscribers.” (69405). As part of that vigorous competition, CRSs make incentive payments and offer productivity pricing arrangements and flexible commercial terms to subscribers. In order to rationalize these incentives on an economic basis, CRSs quite properly and predictably take reasonable steps to protect their expenditures. Agencies that elect to receive incentives from a CRS (or another) also freely elect to adopt those measures.

CRS subscriber contracts reflect free-market dynamics. Increased government regulation would distort those dynamics and create harm: any regulation restricting the ability of CRSs to protect their investments in travel agency subscriber contracts could lead to the reduction or termination of the incentives, to the direct detriment of subscribers. The economic arrangements between CRSs and subscribers do not need continued regulation, much less the expanded government intervention proposed in the NPRM. Indeed, incentives offered by CRSs to travel agencies are not dissimilar to overrides and other incentives that airlines themselves pay to travel agencies, and yet the Department quite properly does not regulate those.

**E. WORLDSPAN'S COMMENTS ON SPECIFIC PROPOSALS AND ISSUES.**

Subject to its overall position in favor of terminating or, alternatively, suspending Part 255 and its further position that any rules that do not terminate should be retained for a temporary transition period only, Worldspan takes the following positions on the principal issues and proposals raised in the NPRM:

**1. Continued Need For The CRS Rules.**

As stated above, there is no basis or continued need for the CRS rules. Part 255 should terminate no later than the new sunset date established in docket OST-2003-14484. In the alternative, the Department should suspend the rules for a two-year period and then propose such rules, if any, as are determined to be necessary to address any anti-competitive practices that the marketplace and antitrust laws are incapable of addressing. In any event, any rules (as amended) retained beyond the new sunset date should expire no more than twelve (12) months thereafter.

**2. Scope Of The CRS Rules.**

**(a) Applicability of Part 255.**

Worldspan supports full and expedited deregulation of CRSs. If any CRS rules are retained for any period of time (including the transition period proposed by Worldspan in Part B.3 above), however, all CRSs must be treated equally. As the Department's NPRM fundamentally recognizes, there is no existing basis for applying Part 255 to some CRSs and not others.

Sabre and Galileo – the two largest traditional CRSs – have periodically suggested that they should be deregulated, while the smaller systems – Worldspan and Amadeus – should continue to be burdened by the requirements and restrictions of Part 255. Needless to say, the two largest systems would love to see their smaller competitors shackled with regulations that do

not apply to them. To the extent that the Department's concerns about system "market power" have any validity (and Worldspan does not concede this), however, those concerns necessarily would be greater in the case of the two largest systems. It is abundantly obvious that there is no public interest rationale for continuing to regulate the two smallest systems while deregulating the two largest ones.

**(b) Extension of rules to Internet sites.**

The Department does not propose to extend Part 255 or similar rules to Internet sites. Consistent with its position that Part 255 should terminate, Worldspan supports the Department and does favor not extending any part of the CRS rules to Internet sites.

A decision to leave Internet sites unregulated, moreover, strongly supports the conclusion that CRSs should be fully deregulated. CRSs and Internet sites are direct competitors. Just as all CRSs should be placed on the same, unregulated footing, so too should CRS and Internet sites be equally free of governmental regulation. Any other result would lead to a government-induced distortion of competition.

**(c) "Short-term" subscriber contracts.**

The Department proposes to amend the definition of "system" in Section 255.3 to exempt firms from being covered by the rules "if they provide services to travel agencies only under short-term contracts or on a transaction-by-transaction basis." (69390). The actual proposed amendment provides that a CRS would not be a covered "system" unless "it is used by a subscriber under a formal contract with the system." Worldspan favors proposals to reduce the scope of Part 255 but is concerned about the vagueness of the language of the proposed amendment itself. Unless "formal contract" is defined, the proposed regulation would be a source of confusion and may not achieve its intended purpose.

**(d) Definition of “subscriber.”**

The Department requests comment on whether it should amend the definition of “subscriber” by deleting the word “neutral.” Given the ability of travel agents to favor specific airlines and the incentives that they receive to do so, Worldspan agrees that the definition of subscriber would more closely reflect marketplace realities if the word “neutral” were deleted.

**3. Booking Fees.**

Worldspan supports the Department’s proposal to eliminate the discriminatory booking fee rule (Section 255.6(a)). The existing rule has harmful effects: it restricts the ability of airlines to bargain for lower booking fees; it inhibits CRSs from giving price breaks both to airlines whose booking volumes would warrant a discount and to new entrant airlines and others that otherwise might not use a CRS; it inhibits CRSs from developing and launching new and innovative price, product and service plans. As a consequence of the foregoing, the rule fosters inefficiency and harms competition.

The NPRM concludes that eliminating the rule would enhance the ability of airlines to negotiate the terms and conditions of CRS participation. At the same time, eliminating the rule would increase the ability of CRSs to develop price and service products that are more closely tailored to the specific needs of specific airlines.

In Worldspan’s experience, the existing rule inhibits Worldspan from devising and implementing new products. The proposed elimination of the fee discrimination rule, therefore,

should lead to better service, lower and differentiated prices and enhanced competition, all of which should directly benefit consumers.<sup>36</sup>

#### **4. Mandatory Participation Rule.**

Worldspan supports the Department's proposal to eliminate the mandatory participation rule (Section 255.7). The rule unfairly and unreasonably affects and penalizes a few airlines. It also works to the competitive disadvantage of the two CRSs that currently happen to be owned by airlines. In conjunction with eliminating the fee discrimination rule, eliminating the mandatory participation rule should increase the ability of the affected airlines to negotiate with other CRSs.

Because they currently "own" a CRS, Worldspan's three airline owners – Delta, American and Northwest – must participate in every other system and are stripped of their bargaining power with the systems as a result. On the other hand, all other U.S. carriers, including carriers that "market" a CRS, are free to base their participation decisions on purely commercial considerations. By the same token, while every other CRS is granted three mandatory U.S. carrier participants (Worldspan's three owners), Worldspan has none. There is no public interest basis for these distinctions or for the competitive imbalances they create.

In the alternative, the Department requests comment on whether the mandatory participation rule, if readopted, should be expanded to cover airlines that market a system. As stated above, the record does not support the application of the CRS rules, if retained, to some CRSs and not others. This would include eliminating the distinction between system owners and

---

<sup>36</sup> The Department and the CAB before it have never proposed to regulate the levels of fees. The NPRM correctly identifies reasons why the regulation of fee levels is unwarranted and impracticable.

marketers under the mandatory participation rule. Worldspan recognizes, however, that this approach would greatly enlarge this area of regulation and would involve the very difficult definitional issue of what constitutes “marketing,” and therefore strongly urges all regulations in this area be eliminated.

**5. Participating Carrier Agreement Provisions.**

The Department has proposed a new Section 255.6(e) that is aimed at (a) prohibiting a CRS from contractually barring an airline from discriminating against that CRS and (b) prohibiting a CRS from requiring an airline to provide it with fares that the airline does not sell through other CRSs or through travel agencies.

Worldspan opposes these proposals as unnecessary and unwarranted government restrictions on the ability of firms to negotiate freely the terms of their commercial agreements. The addition of any such regulations to Part 255 would be antithetical to the goals of deregulation. These proposals are necessarily predicated on the view that CRSs use unconstrained market power over airlines to distort airline competition and that airlines lack any ability to negotiate the terms of participation. As discussed above, that view is undocumented and unsupported and is and will be incorrect in the current and future environments.

**6. Display Bias.**

The Department has proposed to amend Section 255.4(c) to address “screen padding” and to create a new Section 255.11 that would prohibit airlines from providing software to agencies that the agencies can use to bias displays in favor of the airline. Worldspan views these primarily as airline issues and offers no comment at this time other than to re-state its support for eliminating Part 255 altogether and its opposition to the adoption of any additional regulations.



**7. Subscriber Contracts And Productivity Pricing.**

As discussed in Part D above, Worldspan opposes any proposal to expand the already unnecessary regulation of subscriber contracts and CRS-subscriber relations. CRSs wield no market power vis-à-vis travel agencies; the terms and conditions of subscriber contracts are negotiated at arm's length and reflect a balance of commercial benefits for CRSs and agencies alike. Any additional government intervention into this area would disrupt that commercial balance and may harm travel agencies, without any discernable public interest benefit.

The apparent basis for possible additional regulation in this area is the concern that, through booking fees, airlines are bearing the brunt of the economic benefits earned by travel agencies under subscriber contracts. As discussed above, however, the elimination of the fee discrimination rule and the mandatory participation rule, together with the steady growth of alternatives to CRSs, should give airlines new and increased power to negotiate changes in booking fees. In addition, as discussed above, Worldspan is in the process of evaluating new pricing models designed to revise and reallocate the costs of distribution. This market-oriented process should develop more quickly and efficiently in the absence of government regulation than under additional regulation. There is no need or reason for the Department to intervene on behalf of airlines and disrupt this process.

Finally, the Department must be mindful of the potentially disruptive and inequitable effects of any new regulation in this area. Should the Department ultimately impose any new or expanded rules affecting CRS-travel agency contractual relations, the Department must clearly provide that such rules do not apply to any existing contracts.

**(a) Contract term.**

The NPRM discusses contract terms but does not propose any change to the existing rule allowing five-year terms. Most travel agencies elect to have five-year terms because it is in their financial interest to do so. The marketplace is content with the status quo, and any change would be disruptive and create uncertainty, to the detriment of CRSs and agents. Furthermore, the implementation of a new rule restricting term length would raise serious issues of fairness and equity with respect to existing contracts, as the economics of existing contracts are predicated on the term lengths of those contracts. In addition, there are thousands of subscriber contracts with thousands of different expiration dates; a new rule could have widely disparate financial effects, depending on the effective date of the rule.

The NPRM also asks about the experience in Europe in light of the EC rule allowing subscribers to terminate their contracts on three months' notice after the first year. It is Worldspan's general sense that, despite this rule, travel agencies in Europe do not switch systems with any greater frequency than they do in the United States or other jurisdictions.

**(b) Damages clauses.**

The Department proposes to add a new Section 255.7(a) prohibiting contract provisions that require agencies to pay liquidated damages for breach on the basis of "any estimate or expectation that the subscriber would have used the system for any specified number of bookings during the remainder of the contract term." The Department did not find a compelling need to propose such a prohibition in 1992; given the dramatic industry changes and the development of CRS alternatives since that time, there is even less reason to conclude that such a prohibition is needed today. Accordingly, Worldspan opposes the proposal as an unnecessary and unwarranted

government restriction of the ability of firms to negotiate freely the terms of their commercial agreements.

**(c) Productivity pricing.**

The Department proposes a new Section 255.7(c) that would restricting the use of so-called “productivity pricing” arrangements. This restriction would be in addition to the existing prohibition against “minimum volume” requirements in current Section 255.8(b).

Worldspan opposes the Department’s proposal and any other effort to restrict the use of productivity pricing arrangements. The proposed rule would be another unnecessary and unwarranted government restriction of the ability of firms to negotiate freely the terms of their commercial agreements.

Furthermore, the marketplace tolerates – and the government does not regulate – override payments and other incentives paid by airlines to travel agencies. These payments are designed to reward travel agents for making particular volumes of bookings on the paying airline’s flights and create an incentive for agents to book passengers on that airline’s flights. Productivity pricing arrangements are airline-neutral and have no bearing on which airline’s flights an agent recommends to a customer. If there is no public interest need to regulate override payments (and Worldspan suggests that there is not), there is certainly no public interest need to regulate productivity pricing arrangements.

Furthermore, as is the case with contract term length, the marketplace (i.e., CRSs and agencies) is satisfied with the status quo. Productivity pricing provisions are an important element of the economic relationship between CRSs and agencies, provide mutual economic benefits and produce no harm to consumers. The proposed change would be disruptive to individual CRS-agency relationships and to the marketplace in general and might be financially

harmful to the agents. In addition, as in the case of contract term length, because there are thousands of individual subscriber contracts, the method and timing of the actual implementation of such a rule could have disparate effects on given agencies and CRSs and would raise serious questions of fairness and equity.

**8. Third-Party Hardware And Software.**

The Department proposes three changes to the third-party hardware/software rule (current 255.9) intended to provide agencies “some additional assurance” that they may use third-party hardware and software. First, the Department would mandate that CRSs allow subscribers to use hardware supplied by CRSs for the purpose of accessing other CRSs and databases. Second, the Department would prohibit a CRS from restricting subscribers’ ability to use a back-office system in conjunction with bookings outside that CRS. Third, the Department would prohibit CRSs from pricing system services for subscribers using third-party hardware/software at levels that are “disproportionately high” in relation to the pricing of services for other subscribers.

Worldspan opposes these proposals. There is no justification or need for governmental intervention into this aspect of CRS-travel agency relationships. CRSs incur substantial capital, installation, maintenance and other costs in providing equipment to agencies. It would be unfair and commercially unreasonable to prohibit CRSs from controlling the usage of that equipment and to allow agencies to use that equipment for purposes that would be financially harmful to the CRSs or that would result in a deterioration of service.

Furthermore, like the proposals to regulate subscriber contracts and productivity pricing, these proposals would disrupt the negotiated commercial balance between CRSs and agencies and could force changes to the commercial terms, to the detriment of travel agencies.

Finally, there is no need for the proposed rules. Agencies are free to obtain hardware from other sources. If they choose to obtain hardware from a CRS it is because they have decided it is in their economic interest to do so.

**9. Marketing And Booking Data.**

The Department proposes to restrict the types of marketing and booking data that CRSs may sell to airlines and to require CRSs to obtain an airline's consent before releasing data involving bookings on that airline. The NPRM explains that these proposals are intended to address complaints of smaller airlines that the data are being used by larger airlines to dampen competition.

Worldspan opposes the proposed rules. The availability to the marketplace of accurate and timely information promotes competition. Worldspan is aware of no economic or competition theory that supports the proposition that the marketplace would be better off with less information. The data are available to small and large carriers alike. While large carriers may use the information to compete with smaller carriers, they also use the information to compete more effectively against each other and to offer better service to the traveling public. Such vigorous competition leads directly to consumer benefits in the form of lower fares and improved service. If vigorous competition ever crosses the line into anti-competitive conduct, i.e., if information is used for anti-competitive purposes, the antitrust and other laws provide appropriate remedies and the Justice Department and private litigants may pursue those remedies. There is no legitimate pro-competitive basis upon which to conclude that the Department should intervene and restrict the flow of legitimate information to the marketplace.

**10. “Tying Of Internet Participation.”**

The Department invites comment on whether it “should prohibit the tying of participation in a system’s “brick-and-mortar” travel agent services with participation in its services to online travel agents and other Internet sites selling airline tickets.” (69415)

Worldspan opposes this proposal as an unwarranted and unnecessary governmental restriction of a CRS’s ability to market its services to its customers as it sees fit. Subject to consistency with the antitrust laws, which give companies wide latitude to make unilateral decisions regarding how and with whom they do business, CRSs should have the flexibility to negotiate the terms of an airline’s participation without being prevented by the government from pursuing certain commercial arrangements.

Limiting that flexibility would be directly inconsistent with the Department’s proposal to eliminate the fee discrimination rule which, if finalized, will increase the flexibility of CRSs to “customize” service and fee arrangements with participating airlines while increasing the airlines’ ability to demand customized arrangements.<sup>37</sup> For example, Worldspan might accommodate one airline’s desire to have its information displayed for online entities but not in travel agency displays but might take a different position with another airline, with the understanding that the different service arrangements are likely to involve different fee or service arrangements. In other words, the marketplace and not the government should determine the arrangements that CRSs, airlines, and others can explore.

---

<sup>37</sup> Furthermore, as the NPRM recognizes, such a rule could have adverse effects and require an exception for airlines that own or market another website. This result would be inconsistent with the Department’s deregulatory proposal to eliminate the mandatory participation rule, which rule was based on similar concerns.

**11. The Department's Statutory Authority.**

Part 255 was issued under the CAB's then-Section 411 authority to reach conduct by any "air carrier." The CAB consciously elected not to regulate CRSs independent of their affiliations with airlines. The Department now proposes to alter course and to apply Part 255 to all CRSs under its Section 41712 (former 411) authority to reach conduct by any "ticket agent."

Worldspan makes no comment at this time on the Department's proposal, other than to say that the proposal represents a novel interpretation of "ticket agent" as defined in Section 40102(a). Furthermore, consistent with its position that all CRSs should be deregulated or regulated equally, if the Department or a court ultimately determines that the Department does not have the statutory authority to reach CRSs on the grounds that CRSs are "ticket agents," then Part 255 should fall in its entirety, as there currently exists no basis in fact or policy or law<sup>38</sup> to regulate some CRSs and not others.

**12. Sunset Date.**

As discussed throughout these comments, Part 255 should terminate as promptly as possible. The Department already has acknowledged that ongoing changes in the airline and distribution industries may warrant another review of the rules almost immediately after this rulemaking is completed and "may even eliminate the need for some or most of the CRS rules." (69416). This reality highlights the fundamental futility in continuing to regulate the CRS industry: the current regulations are obsolete, and any new or amended regulations will be obsolete or ineffective as soon as they are promulgated. Furthermore, the process of

---

<sup>38</sup> Any regulation that sought to regulate some but not all of the existing four CRSs on the basis of the current record would be vulnerable to attack on the grounds that it is arbitrary and capricious

proposing, debating, implementing and complying with obsolete rules will entail an enormous waste of government and private sector resources. Rather than perpetuating a costly and outmoded regulatory structure, the DOT should either (i) allow Part 255 to terminate no later than the new sunset date established in Docket OST-2003-14484; (ii) suspend the rules for an experimental two-year period during which the marketplace could reveal those areas, if any, that require future regulation; or (iii) retain only a limited number of rules, as amended, for a transition period of not more than twelve (12) months beyond the new sunset date.

**13. Effective Date of the Rules.**

The NPRM invites comment on whether additional time (i.e., more than 30 days after publication of final rules, if that should occur) would be needed to comply with any of the proposed changes to Part 255, due to expense or other difficulties. Without knowing which rules might be retained beyond the current sunset date and what amended form the rules would take, it is premature at this point to comment on when they should become effective.

It is highly likely, however, that some proposed rules would require a much greater lead-time than others. In particular, the proposed new rules that would impact on the terms and conditions of CRS-subscriber contracts and productivity pricing arrangements and on participating carrier agreements would require extensive lead time, possibly measured in years (e.g., the number of years remaining in the term of any subscriber contract), in order to avoid massive and inequitable disruptions to the existing commercial relationships.



**F. CONCLUSION.**

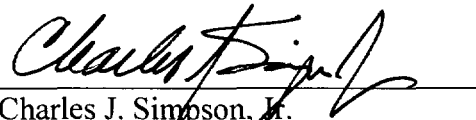
When they were promulgated in 1984, the CRS rules served an important and legitimate purpose. Smaller airlines that did not own a CRS were being disadvantaged by the two largest airlines that owned the two largest CRSs. There were valid reasons for the government to step in and protect airline competition and there was an evidentiary record to support the government's action. The environment, however, has changed dramatically in the intervening 19 years. The policy and factual bases of the CRS rules have been eroded, and the rules have outlived their relevance and usefulness. Indeed, not only are the rules no longer necessary, they actually produce competitive distortions.

The NPRM's proposals to eliminate the fee discrimination rule and the mandatory participation rule reflect the Department's appreciation of the new reality, but they do not go far enough. On the other hand, in proposing new regulations, such as those impinging on the contractual relations between CRSs and travel agency subscribers and between CRSs and participating airlines, the NPRM proposes an unsupportable step backwards. For the many reasons discussed herein, Worldspan urges the Department to terminate Part 255 in its entirety as expeditiously as possible.

Respectfully submitted,



Douglas L. Abramson  
Senior Vice President, Human Resources  
General Counsel and Secretary  
WORLDSPAN, L.P.  
300 Galleria Parkway  
Atlanta, Georgia 30339  
(770) 563-7401



Charles J. Simpson, Jr.  
ZUCKERT, SCOUTT & RASENBERGER,  
L.L.P.  
888 17th Street, N.W.  
Suite 600  
Washington, D.C. 20006  
(202) 298-8660

Counsel for Worldspan, L.P.

**LIST OF EXHIBITS**

|               |  |
|---------------|--|
| Exhibit WSP-1 | CRS Shares of U.S. CRS Bookings                          |
| Exhibit WSP-2 | E-commerce Bookings as Share of Total Worldspan Bookings |
| Exhibit WSP-3 | Enplanements vs. Traditional Travel Agency Bookings      |
| Exhibit WSP-4 | Southwest Airlines Market Share                          |
| Exhibit WSP-5 | Domestic Passenger Revenue Enplanements.                 |

## CRS SHARES OF U.S. CRS BOOKINGS

|      | Sabre            |                      |        | Galileo          |                      |        | Amadeus          |                      |        | Worldspan        |                      |        |
|------|------------------|----------------------|--------|------------------|----------------------|--------|------------------|----------------------|--------|------------------|----------------------|--------|
|      | On-line Agencies | Traditional Agencies | Total  | On-line Agencies | Traditional Agencies | Total  | On-line Agencies | Traditional Agencies | Total  | On-line Agencies | Traditional Agencies | Total  |
| 1998 | 34.48%           | 43.44%               | 43.31% | 37.54%           | 27.51%               | 27.66% | 0.00%            | 10.39%               | 10.24% | 27.98%           | 18.66%               | 18.80% |
| 1999 | 32.26%           | 44.20%               | 43.37% | 18.60%           | 26.97%               | 26.56% | 0.00%            | 9.74%                | 9.23%  | 49.14%           | 19.09%               | 20.84% |
| 2000 | 32.81%           | 45.81%               | 44.58% | 10.10%           | 25.91%               | 24.17% | 0.05%            | 8.76%                | 7.85%  | 54.92%           | 19.52%               | 23.40% |
| 2001 | 36.92%           | 46.21%               | 44.65% | 0.54%            | 25.50%               | 21.29% | 0.53%            | 9.58%                | 8.05%  | 62.01%           | 18.71%               | 26.01% |
| 2002 | 35.01%           | 45.86%               | 43.39% | 0.34%            | 25.91%               | 20.07% | 0.10%            | 9.85%                | 7.62%  | 64.56%           | 18.38%               | 28.92% |

Source: MIDT. Includes U.S. bookings processed by CRS.

**E-COMMERCE BOOKINGS  
AS SHARE OF TOTAL WORLDSPAN BOOKINGS  
(NORTH AMERICA BOOKINGS IN 000's)**

|       | <b>Traditional<br/>Agency<br/>Bookings</b> | <b>E-Commerce<br/>Bookings</b> | <b>Total<br/>Bookings</b> | <b>E-Commerce<br/>Percent of<br/>Total</b> |
|-------|--|--------------------------------|---------------------------|--|
| 1998  | 98,646                                     | 2,971                          | 101,617                   | 2.90%                                      |
| 1999  | 100,331                                    | 13,795                         | 114,126                   | 12.10%                                     |
| 2000  | 95,221                                     | 30,562                         | 125,783                   | 24.30%                                     |
| 2001  | 94,306                                     | 52,436                         | 146,742                   | 35.70%                                     |
| 2002e | 74,611                                     | 72,022                         | 146,633                   | 49.10%                                     |

Source: Worldspan data.

## Enplanements vs. Traditional Travel Agency Bookings

|                                       | ATA Carrier<br>Domestic<br>Revenue<br>Passenger<br>Enplanements<br>(000) | Traditional<br>Travel Agency<br>Bookings (000) |
|---------------------------------------|--|--|
| 1997                                  | 549,995  | 495,690  |
| 1998                                  | 555,113  | 476,005  |
| 1999                                  | 573,562  | 461,138  |
| 2000                                  | 593,418  | 440,101  |
| 2001                                  | 550,743  | 364,828  |
| 2002                                  | 525,316  | 307,026  |
| <b>Annual<br/>Per Cent<br/>Change</b> | -0.90%   | -9.10%   |

Sources: Air Transport Association and MIDT

## Southwest Airlines Industry Share

|      | ATA Carrier Domestic<br>Revenue Passenger<br>Emplanements (000) | Southwest<br>Revenue<br>Passenger<br>Emplanements<br>(000) | Southwest<br>Share |
|------|---|--|--------------------|
| 1992 | 456,012   | 27,839   | 6.1%               |
| 1993 | 461,750   | 36,955   | 8.0%               |
| 1994 | 495,056   | 42,743   | 8.6%               |
| 1995 | 502,285   | 44,786   | 8.9%               |
| 1996 | 531,231   | 49,622   | 9.3%               |
| 1997 | 549,995   | 50,400   | 9.2%               |
| 1998 | 555,113   | 52,586   | 9.5%               |
| 1999 | 573,562   | 57,500   | 10.0%              |
| 2000 | 593,418   | 63,678   | 10.7%              |
| 2001 | 550,743   | 64,447   | 11.7%              |
| 2002 | 525,316   | 63,046   | 12.0%              |

Source: Air Transport Association and Company Reports

| Domestic Revenue Passenger Enplanements (000) |              |                              |                      |                      |        |                               |
|---|--------------|------------------------------|----------------------|----------------------|--------|-------------------------------|
|   |              | Non/Limited CRS Participants |                      |                      |        |                               |
|   | ATA Carriers | Southwest <sup>1</sup>       | JetBlue <sup>1</sup> | AirTran <sup>2</sup> | Total  | Non/Limited Participant Share |
| 1997  | 549,995      | 50,400                       |                      | 3,006                | 53,406 | 9.7%                          |
| 1998  | 555,113      | 52,586                       |                      | 5,463                | 58,049 | 10.5%                         |
| 1999  | 573,562      | 57,500                       |                      | 6,461                | 63,691 | 11.2%                         |
| 2000  | 593,418      | 63,678                       | 1,144                | 7,567                | 72,389 | 12.2%                         |
| 2001  | 550,743      | 64,447                       | 3,117                | 8,303                | 75,867 | 13.8%                         |
| 2002  | 525,316      | 63,046                       | 5,752                | 9,654                | 78,452 | 14.9%                         |
| Growth  | -4.50%       |                              |                      |                      | 47%    |                               |

Source: Air Transport Association and Company Reports

<sup>1</sup> Participates in Sabre Basic Request level. Does not participate in any other CRS

<sup>2</sup> Began CRS participation in the past 2 years

## **CERTIFICATE OF SERVICE**

I hereby certify that on this 17th day of March 2003, a copy of the foregoing document was served by mail, hand or e-mail on the parties named below:

David H. Coburn  
Steptoe & Johnson LLP  
1330 Connecticut Avenue, N.W.  
Washington, DC 20036

Paul M. Ruden  
Senior Vice President  
American Society of Travel Agents  
1101 King Street  
Alexandria, VA 22314

David Schwarte  
Sabre Inc.  
3150 Sabre Dr.  
Mail Drop 9105  
Southlake, TX 76092

Kenneth P. Quinn  
Pillsbury Winthrop LLP  
1133 Connecticut Avenue, N.W.  
Suite 1200  
Washington, DC 20036

Samuel H. Wright  
Cendant Corporation  
101 Constitution Avenue, N.W.  
Suite 800  
Washington, DC 20001

Eugene Laney, Jr.  
Director of Information &  
Legislative Services  
National Business Travel Assoc.  
110 North Royal Street  
4<sup>th</sup> Floor  
Alexandria, VA 22314

Linda F. Golodner  
President  
National Consumers League  
1701 K Street, N.W.  
Suite 1200  
Washington, D.C. 20006

Don Saunders  
800 N.W. Loop 410  
San Antonio, TX 78216

Brian Hand  
Nordlicht & Hand  
645 5<sup>th</sup> Avenue  
New York, NY 10022

Andrew Milne  
7918 Jones Branch Drive  
Suite 600  
McLean, VA 22102-3307

Fred DeCicco  
Pollack, Pollack, Isaac & DeCicco  
225 Broadway  
New York, NY 10007

Rosemarie Christofolo, Esq.  
1630 S. Stapley Drive  
Suite 217  
Mesa, AZ 85204

John Risberg, Esq.  
1395 N. Highway Drive  
Fenton, St. Louis, MO 63099

Eugene A. Over, Jr.  
General Counsel  
Navigant International, Inc.  
84 Inverness Circle East  
Englewood, CO 80112



Joanne W. Young  
Counsel for America West  
Baker & Hostetler, LLP  
1050 Connecticut Avenue, N.W.  
Suite 1100  
Washington, D.C. 20036

Megan Rae Rosia  
Managing Director – International  
Affairs and Associate General  
Counsel  
Northwest Airlines, Inc.  
901 Fifteenth Street, N.W.  
Suite 310  
Washington, D.C. 20005

Robert W. Kneisley  
Associate General Counsel  
Southwest Airlines Co.  
1250 Eye Street, N.W.  
Suite 1110  
Washington, D.C. 20005

Carl B. Nelson, Jr.  
Associate General Counsel  
American Airlines, Inc.  
1101 Seventeenth Street, N.W.  
Suite 600  
Washington, D.C. 20036

Donald T. Bliss  
Counsel for US Airways  
O'Melveny & Myers LLP  
555 13<sup>th</sup> Street, N.W.  
Suite 500 West  
Washington, D.C. 20004

Kenneth P. Quinn  
John E. Gillick  
Counsel for Sabre  
Pillsbury Winthrop LLP  
1133 Connecticut Avenue, N.W.  
Suite 1200  
Washington, D.C. 20036

Robert E. Cohn  
Alexander Van Der Bellen  
Counsel of Delta Air Lines  
Shaw Pittman LLP  
2300 N Street, N.W.  
Washington, D.C. 20037

David Warmflash  
Sexter & Warmflash  
115 Broadway  
New York, NY 10006

Roy Hadley  
World Travel BTI  
1055 Lenox Park Boulevard  
Suite 420  
Atlanta, GA 30319

R. Bruce Keiner  
Crowell & Moring LLP  
1001 Pennsylvania Avenue, N.W.  
Washington, D.C. 20004

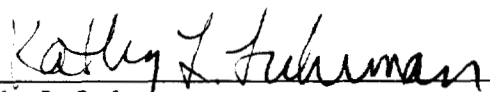
Jeffrey A. Manley  
Wilmer, Cutler & Pickering  
2445 M Street, N.W.  
Washington, D.C. 20037

Frank J. Costello  
Paul E. Schoellhamer  
Counsel for Orbitz  
Zuckert, Scoutt & Rasenberger, LLP  
888 Seventeenth Street, N.W.  
Suite 600  
Washington, D.C. 20006

Michael Goodman  
Wolf & Goodman  
1350 S. Glencoe Street  
Denver, CO 80222

Carolyn Corwin  
Counsel for Galileo International,  
L.L.C.  
Covington & Burling  
1201 Pennsylvania Avenue, N.W.  
Washington, D.C. 20004-2401

Robert Blakeney, Esq.  
4300 Sigma Road  
Suite 100  
Dallas, TX 75244

  
Kathy L. Luhrman